TRIAL; 2012 Depo. Trans. LEXIS 852

SUPREME COURT OF NEW YORK, QUEENS COUNTY, CIVIL TERM, PART 6

INDEX NUMBER: 32450/09

June 7, 2012

Reporter
2012 Depo. Trans. LEXIS 852 *

HERMENEGILDO REYES, Plaintiff, - against - MARKETING WERKS, INC., and OSCAR LEE GARCIA, Defendants.

Expert Name: Dr. FRANK RICHTER, III, M.D.LEO JOHN SHEA, III, Ph.D.Debra Sabatini Dwyer, Ph.D., M.S.

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Counsel

[*1] WITTENSTEIN & ASSOCIATES, P.C., Attorneys for the Plaintiff, Forest Hills, New York, BY: HARLAN WITTENSTEIN, ESQ.

TROMELLO, McDONNELL & KEHOE, ESQS., Attorneys for the Defendants, Melville, New York, BY: JAMES S. KEHOE, ESQ.

Judges

BEFORE HONORABLE HOWARD G. LANE, Justice of the Supreme Court, (And a Jury)

Proceedings

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[1](Whereupon, Plaintiff's Exhibit 17, chart of

[2]future medical care, was marked for identification.)

[3]THE CLERK: Case on trial continues. This is

[4]index number 32450 of 2009, Hermenegildo Reyes versus

[5]Marketing Werks Incorporated and Oscar Lee Garcia.

[6]THE COURT: Parties ready to proceed?

[7]MR. WITTENSTEIN: Yes, your Honor.

[8]THE COURT: Ready for the jury.

[9](Whereupon, the jury entered the courtroom.)

[10]THE CLERK: Let the record reflect the presence

[11]and proper **[*2]** seating of the jury.

[12]THE COURT: Thank you, please be seated.

[13]Good morning, members of the jury. We welcome you

[14]back. We will be continuing the trial.

[15]At this time, plaintiff, you may call your next

[16]witness.

[17]MR. WITTENSTEIN: Thank you, your Honor. I call

[18]Dr. Edwin Richter.

[19]E D W I N F. R I C H T E R, calledasa

[20]witness by and on behalf of the Plaintiff having been first

[21]duly sworn, was examined and testified as follows:

[22]THE CLERK: In a loud, clear voice your name and

[23]address for the record.

[24]THE WITNESS: Dr. Edwin F Richter 166 West Broad

[25]Street Stamford, Connecticut 06902.
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[1]THE COURT: You my inquire, counsel.

[2]MR. WITTENSTEIN: Thank you, your Honor.

[3]DIRECT EXAMINATION

[4]BY MR. WITTENSTEIN:

[5]Q Good morning, Dr. Richter.

[6]A Good morning.

[7]Q Did you bring your medical chart with you in order to

[8]refresh your recollection?

[9]A Yes, I did.

[10]Q Are you licensed to practice medicine in the State of

[11]New York?

[12]A Yes, I am.

[13]Q Are you licensed to practice medicine anywhere else?

[14]A Yes, state of Connecticut. **[*3]**

[15]Q When did you start practicing medicine?

[16]A In 1991.

[17]Q Where is your office located?

[18]A It is at 166 West Broad Street Stamford, Connecticut

[19]06902 in a building called the Physicians Office Building which

[20]is attached to Stamford Hospital.

[21]Q Please tell us about your practice?

[22]A My practice is in the specialty or field of physical

[23]medicine and rehabilitation also known as physiatry. That is a

[24]specialty of physicians that takes care of patients with

[25]disabling conditions.

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[1]So on my inpatient unit I would typically take care of

[2]patients with strokes, brain injuries, spinal cord injuries,

[3]major fractures, major joint replacements, other neurological

[4]disorders and a few other general types of patients who've had

[5]something happen to them that prevents them from functioning.

[6]For my inpatients, these are people who couldn't go

[7]home from the hospital because of whatever condition they were

[8]treated for in the acute hospital, so they would come over to

[9]the rehab unit to get rehabilitation to try to get them home.

[10]In my office I sometimes see those patients **[*4]** after

[11]they've gone home for their followup care because many of them

[12]need outpatient rehabilitation.

[13]And I also see a different population of patients with

[14]disabling conditions, many of those are people with what we call

[15]musculoskeletal conditions, those would be things like neck

[16]pain, back pain, arthritis, some have neurological problems like

[17]a neuropathy and some of them are chronic pain patients. It's a

[18]variety of different types of patients, what they all have in

[19]common, they have some sort of condition that would tend to

[20]prevent them from functioning normally.

[21]Q Doctor, are some of these people injured in motor

[22]vehicle accidents?

[23]A Yes, many of them.

[24]Q Over the years can you estimate for us the number of

[25]patients you've treated who have been involved in motor vehicle
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[1]accidents?

[2]A That's several thousands, I would think.

[3]Q As part of your medical practice do you prepare life

[4]care plans?

[5]A Yes, I do.

[6]Q What is a life care plan?

[7]A A life care plan is a plan for a patient who's going to

[8]have continued needs, not somebody who just needs **[*5]** to see me for

[9]one or two visits, or a therapist for seven or eight visits, but

[10]someone who's going to need long term treatment across the span

[11]of their life. This could be physical therapy, it could be

[12]medical treatments, medications, medical tests.

[13]Q Please briefly share with us your educational

[14]background beginning when you went to college?

[15]A Starting at college, that was Harvard, I graduated in

[16]1983 with a bachelors degree in biology with honors.

[17]I then went on to New York University School of

[18]Medicine, I graduated from there in 1987.

[19]I then started my internship and residency, which are

[20]the postgraduate training doctors do before they practice; that

[21]was in my field of physical therapy and rehabilitation.

[22]But the internship was a rotating internship at NYU

[23]between Tisch Hospital and Bellevue Hospital with rotations in

[24]internal medicine, neurology, neurosurgery and orthopedics.

[25]After that one year internship, I did three years of
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[1]residency training in my field of physical medicine and

[2]rehabilitation, most of which was at the Rusk Institute at NYU

[3]but also at Bellevue **[*6]** Hospital, the Manhattan VA Hospital, the

[4]Hospital for Joint Diseases and Goldwater Hospital. I completed

[5]that training in 1991.

[6]Q Doctor, while you were at the Rusk Institute did you

[7]ever cross paths with Dr. Leo Shea?

[8]A Yes, many times. After I completed my residency

[9]training I stayed on at NYU both as a teacher, now I am an

[10]associate clinical professor and for many years my practice was

[11]at NYU. I was director of the stroke program; director of an

[12]outpatient mild traumatic brain injury program; and also

[13]associate clinical director of the hospital. Dr. Shea was one

[14]of our senior neuropsychologists and we worked together on many

[15]projects and co-treated many patients together.

[16]Q Doctor, please tell us about your experience in

[17]treating people who've suffered either mild, moderate or severe

[18]traumatic brain injuries?

[19]A I've taken care of patients in all of those categories.

[20]On my inpatient service I've treated many patients with moderate

[21]to severe brain injuries; these are usually patients who has had

[22]prolonged loss of consciousness, often have significant

[23]abnormalities on their CAT **[*7]** scan or MRI, many of them have not

[24]only cognitive thinking problems but many of them also have

[25]damage to parts of their brain that control motions, they might
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[1]have paralysis in certain parts of their body. In many ways

[2]those patients overlap with my stroke rehab patients, so I've

[3]treated many patients like that on an inpatient basis initially

[4]and then later on either in the nursing home or as an

[5]outpatient.

[6]Mild traumatic brain injury is actually a confusing

[7]term --

[8]MR. KEHOE: Can I ask you to keep your voice up a

[9]little bit, I am having trouble hearing you.

[10]THE WITNESS: Yes, I am sorry.

[11]A Mild traumatic brain injury is a somewhat confusing

[12]term. It refers to people who have had a head injury or a head

[13]trauma who then have either no loss of consciousness or only a

[14]brief loss of consciousness. When they go to an emergency room

[15]and the doctors evaluate them they use a standard scale called a

[16]Glasgow Coma Scale seeing if a person can open their eyes, if

[17]they can talk coherently versus being dazed and confused versus

[18]speaking gibberish or not able to speak. See if the person

[19] **[*8]** moves, or unable to move, or random movements, or movements when

[20]someone jabs them with a pin, all the way up to does the person

[21]have controlled movements so they can move in a manner like I am

[22]doing here, picking up this piece of paper where I know what I'm

[23]doing.

[24]With the mild traumatic brain injury patients their

[25]scores on the Glasgow Coma Scale are typically 13 to 15, at the
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[1]higher end, because it's not a very sensitive -- it's not a very

[2]sophisticated test. But in the emergency room, assuming the

[3]person made it to the emergency room, they would score in that

[4]higher range.

[5]And if and when the person has a CAT scan or MRI of the

[6]their brain it would typically be normal. However, those

[7]patients, despite having a normal CAT scan or MRI, have problems

[8]with thinking. They don't think at the level that they did

[9]previously. They may have a different variety of problems, it

[10]might be memory, it might be attention, it might be

[11]concentration, it might be the speed at which they can do mental

[12]work, but they have mental dysfunction and they may also have

[13]other related symptoms, like headache **[*9]** or dizziness that persists

[14]long after you would expect that those things might of gotten

[15]better from a bump on the head.

[16]So those patients need outpatient therapy and I have

[17]treated many patients like that in combination with

[18]psychologists which can include neuropsychologists who treat the

[19]cognitive problems or psychotherapists who might treat the

[20]associated emotional problems like anxiety or depression and

[21]also various physical or occupational therapists or speech

[22]therapists if the person needs those services too.

[23]Q Doctor, since you mentioned the Glasgow Coma Scale, did

[24]you have an opportunity when you began working on this case to

[25]review the hospital records?

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[1]A Yes, I did.

[2]Q Can you please explain what the findings were in the

[3]hospital records regarding the Glasgow Coma Scale?

[4]A Yes. Mr. Reyes scored a 14 out of 15. He was able to

[5]open his eyes and he was able to talk, so he got the maximum

[6]score for both of those categories.

[7]As far as the cognitive piece, which is the third piece

[8]of it, he was dazed and confused, so he scored one point less

[9]than the maximum, **[*10]** so he got a 14 out of a 15.

[10]Q Doctor, I am going to shift back to your background a

[11]little bit again. Can you please tell us about some of the

[12]presentations you've made to professional organizations either

[13]in the field of traumatic brain injury or in physical medicine

[14]and rehabilitation?

[15]A I've given presentations in settings. I lectured

[16]frequently at my own hospitals at NYU or at Stamford. I've also

[17]given lectures on brain injury in the State University of New

[18]York in New York City. I've gone to Hong Kong and to Montreal

[19]and to London to speak to various international organizations

[20]pertaining to brain injury. I've gone to Mexico City to give

[21]presentations regarding orthopedic rehab. And I've lectured in

[22]several city's around the United States at organizations such as

[23]the American Academy of Physical Medicine And Rehabilitation,

[24]which is our professional society.

[25]Q Have you ever been a memory of the advisory board of
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[1]the Brain Injury Society?

[2]A Yes, I have.

[3]Q What were your responsibilities there?

[4]A I was the chairman of the advisory board of the Brain

[5]Injury **[*11]** Society, which was an organization that promoted

[6]knowledge and information about brain injury. We used to put on

[7]a number of seminars, had a website and also published some news

[8]letters.

[9]Q Doctor, in your medical career have you received any

[10]awards or honors?

[11]A Yes, I have. During the end of my residency I was

[12]awarded the award for outstanding performance by a resident at

[13]the Rusk Institute, and I have been named a Top Doctor in

[14]America in my specialty by Castle Connelly, which is a doctor

[15]rating organization and through that I've been named a top

[16]doctor in New York by New York magazine, and a top doctor in

[17]Fairfield County, Connecticut by Stamford magazine, Greenwich

[18]magazine and a couple of others.

[19]Q Doctor, very briefly, have you published any articles

[20]over the years in the area of traumatic brain injury?

[21]A Yes, I have.

[22]Q Tell us about that?

[23]A I've published a number of articles through my work at

[24]NYU regarding case reports and studies.

[25]I have also written textbook chapters in two different
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[1]textbooks about traumatic brain injury.

[2]Q Doctor, did **[*12]** you ever have any internships in neurology,

[3]orthopedics or neurosurgery?

[4]A Yes.

[5]Q Please explain?

[6]A I did my rotations in orthopedics and neurosurgery at

[7]Tisch Hospital, which at the time was called University

[8]Hospital, part of NYU Medical Center.

[9]Neurology rotations were at Bellevue Hospital, also

[10]affiliated with NYU.

[11]Q You mentioned earlier that you have taught medical

[12]school, can you tell us a little bit more about that?

[13]A I give what I call grand rounds, which are formal

[14]lectures and informal bedside teaching or what we call clinical

[15]rounds. This would be in all different aspects of physical

[16]medicine and rehabilitation, which would include stroke, brain

[17]injury, orthopedic rehabilitation, amputee rehabilitation, among

[18]the more common topics.

[19]Q Are you board certified in any areas of medicine?

[20]A Yes.

[21]Q Please tell us about that?

[22]A I am board certified in physical medicine and

[23]rehabilitation. What that means is, at the end of my final year

[24]of residency I took and passed a written examination. That made

[25]me eligible one year later to go **[*13]** to the Mayo Clinic where my
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[1]specialty has an oral examination once a year. Because I passed

[2]that examination, which would have been in 1992 and I was

[3]recommended by two doctors in my field who were already board

[4]certified themselves, my credentials were accepted by the board,

[5]which means that I am a Diplomate of the American Board of

[6]Physical Medicine And Rehabilitation.

[7]Q Doctor, what does the term hospital privileges mean?

[8]A Hospital privileges means that as a doctor you're

[9]allowed to admit patients to a hospital or to consult on other

[10]doctors' patients in that hospital.

[11]Q Where do you currently have hospital privileges?

[12]A At Stamford Hospital.

[13]MR. WITTENSTEIN: Your Honor, at this time I would

[14]like to offer Dr. Richter, an expert in the field of

[15]physical medicine and rehabilitation.

[16]THE COURT: Any objection?

[17]MR. KEHOE: No objection.

[18]Q Are you collecting a fee for being here in court today?

[19]A Yes, I am.

[20]Q How much is that fee?

[21]A $ 3,500

[22]Q Did my office refer Mr. Reyes to you?

[23]A Yes.

[24]Q Was this the second **[*14]** time that I ever asked you to

[25]evaluate somebody?

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[1]A Yes.

[2]Q Last winter did you testify for one of my clients who

[3]was hit by a bus?

[4]A Yes.

[5]Q In this case, in the Reyes case, what were you engaged

[6]for?

[7]A I was engaged to review records, to conduct an

[8]examination and to project his future medical care needs.

[9]Q When did you perform the evaluation on Mr. Reyes?

[10]A February 15, 2012.

[11]MR. KEHOE: I didn't hear the date.

[12]THE WITNESS: February 15, 2012.

[13]Q Before you prepared Mr. Reyes's life care plan did you

[14]review any medical records or documents?

[15]A Yes, I did.

[16]Q Without giving us a laundry list of what you reviewed,

[17]would it be fair to say you reviewed approximately 15 different

[18]items?

[19]A Yes.

[20]Q In the United States what are the two most common

[21]causes of traumatic brain injury?

[22]A Across United States, motor vehicle accidents and

[23]falls.

[24]Q And in this case do we have both those elements

[25]present?

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[1]A Yes, we do.

[2]Q In the motor vehicle collision context, are certain

[3]type of **[*15]** injuries more likely to occur in the pedestrian scenario

[4]as opposed to being a passenger in a car?

[5]A Yes.

[6]Q Please explain?

[7]A For the pedestrian, first of all, they are much more

[8]likely to sustain fractures. Typically if someone is hit by a

[9]car they are hit by the bumper and they are struck on the leg

[10]near the knee so they are likely to get leg fractures.

[11]MR. KEHOE: I will object. Can I have a sidebar?

[12]THE COURT: Yes.

[13](Whereupon, discussion held off the record.)

[14]THE COURT: The objection is withdrawn?

[15]MR. KEHOE: Yes, based on counsel's statement.

[16]THE COURT: Thank you.

[17]Q Doctor, as I was saying, in the scenario of pedestrian

[18]collisions versus passengers in a car what types of injuries are

[19]you more likely to see in the pedestrian scenario?

[20]A Pedestrians? Fractures, fractures of long bones, and

[21]brain injuries are more likely for the pedestrian injuries

[22]versus the passenger or driver.

[23]Q Are brain injuries likely to occur in a pedestrian

[24]scenario?

[25]A In that type of injury the person may strike their head
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[1]on the vehicle or be propelled **[*16]** through the air and strike their

[2]head on the ground.

[3]The person in the car, the driver or passenger,

[4]particularly if they have a seatbelt on, is much less likely to

[5]have their head come in direct contact with anything hard. It

[6]mostly might hit an air bag or padded back of the seat. The

[7]person in the car may get what in laymen's term is a whiplash

[8]area where the head goes back and forth that may cause a brain

[9]injury, but that typically is less likely or less severe than

[10]what happens to the pedestrian.

[11]Q Before you mentioned fractures of long bones in the

[12]pedestrian scenario, is a tibia considered to be a long bone?

[13]A Yes, it is.

[14]Q When you met Mr. Reyes did you take a medical history

[15]from him?

[16]A Yes, I did.

[17]Q Did Mr. Reyes tell you about the type of work that he

[18]did?

[19]A Yes.

[20]Q Did you perform a physical examination of Mr. Reyes?

[21]A Yes, I did.

[22]Q Can you please tell us about your findings on the

[23]physical examination?

[24]A Yes. On the physical exam I start by looking at the

[25]patient and observing them. He was normal in terms of the
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[1] **[*17]** overall appearance of his body.

[2]He did not appear to be in distress while at rest,

[3]sitting. When he was walking however he had a notably antalgic

[4]gait. Antalgic gait means that he was limping, that he was

[5]walking unevenly.

[6]I then proceeded to perform certain physical

[7]examination maneuvers. And for some of the things that a

[8]physiatrist, a doctor like myself does, you have to ask the

[9]patient to do certain things, to move your arm a certain way, or

[10]to pull against me while I pull the other way; and I noted that

[11]while he appeared cooperative and friendly, he needed repeated

[12]explanations through an interpreter.

[13]I should mention that I am not fluent in Spanish, I

[14]know some words and phrases, but I was working with an

[15]interpreter who was bilingual to eliminate any problem with

[16]language barrier, however, even with the help of the interpreter

[17]we had to tell him how to do things more than once, or sometimes

[18]demonstrate visually with myself showing do this or something

[19]like that to get him to know what I wanted him to do.

[20]I checked range of motion --

[21]Q Doctor, can I interrupt you for **[*18]** a moment, please. You

[22]just talked about something, you mentioned the term visual cue?

[23]A Yes.

[24]Q Give us an example of a visual cue, please?

[25]A A visual cue would be if I say come over here and
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[1]someone doesn't do that, I might go like this (indicating) to

[2]get someone to come towards me. When I say come over here, what

[3]I am doing is reaching a certain part of the brain, the part of

[4]the brain that processes sounds, interprets sounds as words,

[5]figures out what those words mean, then goes ahead and let's the

[6]person figure out if they want to do what I am telling them to

[7]do.

[8]If I do this (indicating) I am reaching out to a

[9]different part of the brain that interprets gestures, in that

[10]particular example, to show the person another way for me to

[11]show that person what I want them to do.

[12]Q Mr. Reyes's case, did you have to use some visual cues?

[13]A Yes, I did.

[14]Q Can you give us an example?

[15]A If I wanted him to -- for example, when I test

[16]strength, which we call manual muscle testing, and I will use my

[17]arm because it's easy for me to show the jury, if this was **[*19]** Mr.

[18]Reyes's arm and I wanted to see how strong his biceps was, how

[19]well he could flex, I would be telling him bend your elbow, and

[20]the translator would translate that into Spanish, and he

[21]wouldn't understand, he would sort of look at me with a puzzled

[22]look on his face, he didn't know what to do. If I went like

[23]this (indicating) he could figure out that's what I wanted him

[24]to do.

[25]Q You also told us when you gave Mr. Reyes instructions
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[1]you had to tell him more than one time, is there any

[2]significance to that?

[3]A Yes, there is. And I was not asking him to do

[4]complicated things, these would be everyday simple things like

[5]take off your shoes so I could look at your foot or sit up on

[6]the exam table now. And I would say it to him in English, I

[7]didn't expect him to understand that, but then the interpreter

[8]would translate it into Spanish and he would again -- he sort of

[9]looked like he was in a fog, like he didn't understand what I

[10]wanted him to do, until I told him again, maybe rephrasing it a

[11]little bit or getting him up on the exam table, giving him a cue

[12]again like a pat on the table while **[*20]** the interpreter said what to

[13]do.

[14]Q Did you see any scars on Mr. Reyes's body?

[15]A Yes, I did.

[16]Q Where were the scars located?

[17]A Multiple scars on his left leg, which would be, I

[18]should say, I use the term left lower extremity in my report,

[19]but that's the lower leg.

[20]Q Doctor, did you perform any range of motion testing for

[21]the ankle or the knee?

[22]A Yes, I did.

[23]Q Please tell us what your findings were?

[24]A He did have the ability to do range of motion, he could

[25]move his ankle, for example, and I am going to use my wrists
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[1]since it's easier than trying to raise my foot up, I asked the

[2]person to go up, like up off the gas, that's called

[3]dorsiflexion, or to push down like stepping on the gas, which we

[4]call plantarflexion and he had weakness in both of those

[5]directions. You normally grade the person on a one to five, or

[6]zero to five scale, with five being normal, his score was four,

[7]which was weak particularly for a man his age and size.

[8]Again, at the knee where the person can bend or

[9]straighten out the knee we call that flexion or extension, he

[10] **[*21]** was again limited to four out of five strength at the knee joint

[11]as well. So those were both limited.

[12]Q Doctor, did you make any observations regarding the

[13]left peroneal nerve?

[14]A Yes, the left peroneal nerve, it's a nerve in the lower

[15]leg, it starts out around the knee, around the outside of the

[16]knee, and it goes down into the foot and among other things,

[17]brings sensation, feeling to the top of the foot. And I use a

[18]device called a filament, it's a thin, somewhat flexible piece

[19]of plastic, so that when I touch the person with it, it has a

[20]handle, but I touch the person with the filament and when I

[21]touch their body with a filament it gives a standard amount of

[22]pressure, no matter how I maneuver it when it touches the person

[23]it's a standard amount of pressure that little plastic stick

[24]gives and he had a decrease in the territory, the area where the

[25]peroneal nerve supplies feeling.

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[1]Q Did you take measurements of both of Mr. Reyes's legs?

[2]A Yes, I did.

[3]Q Please tell us what your findings were?

[4]A I measured the circumference of his calf on both sides,

[5]on the right it was **[*22]** 40.5 centimeters, on the left it was 39

[6]centimeters, so that's a difference of 1.5 centimeters. And for

[7]people who are more used to thinking in inches, 2.5 centimeters

[8]is approximately one inch, so that would be about 60 percent of

[9]an inch difference.

[10]Q Is there any significance to the difference?

[11]A Yes, there is. Normally the human body is symmetrical.

[12]There may be a difference of maybe a half a centimeter would not

[13]be remarkable but 1.5, one and-a-half centimeters, is

[14]significant as a measurement. And that's associated with muscle

[15]atrophy.

[16]The reason why he had a difference is because there was

[17]some atrophy, shrinkage of the muscles in the left calf. There

[18]are two reasons why we see muscle atrophy or muscle shrinkage in

[19]a particular area, one is if the nerve supply has been cut or

[20]reduced; and the other, which is more likely the factor with Mr.

[21]Reyes, is disuse, he is favoring the leg, in laymen's terms he

[22]is not using it as much, he is relying more on the right side so

[23]the muscles on the left side get weaker and smaller.

[24]Q What's the long term significance of that, sir?

[25] **[*23]** A That can progress, the person can get more weak on that
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[1]left side, they are going to rely more on the right side so they

[2]may get overuse syndromes on the right side over time; but also

[3]as you have that weakening of the muscles on the injured side we

[4]rely on our muscle strength among other things to protect the

[5]joint.

[6]So when you have weak muscles, whether the muscles that

[7]move the knee or the ankle you're at more risk for injuring

[8]those joints, you're at more risk for accelerating the normal

[9]wear and tear of every day life that gives people

[10]osteoarthritis, and you also, by changing the way the person

[11]walks, put them at risk for problems elsewhere, such as the

[12]lower back.

[13]Q Doctor, after completing the physical examination and

[14]reviewing the medical documentation did you formulate any

[15]opinions within a reasonable degree of medical certainty about

[16]Mr. Reyes?

[17]A Yes.

[18]Q Please tell us about that?

[19]A I have several opinions about him, one is that he is

[20]status post pedestrian versus motor vehicle accident, that's the

[21]medical jargon we use to say somebody was hit by a car **[*24]** or a

[22]truck or a bus. He sustained some injuries from this, one was

[23]traumatic brain injury, another, the general category, is trauma

[24]to the left lower extremity specifically there he had the tibia

[25]and fibula fractures and the posttraumatic peroneal nerve injury
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[1]with a peroneal neuropathy resulting from that.

[2]In terms of his brain injury, he has chronic cognitive

[3]dysfunction, meaning that his thinking processes are permanently

[4]not working right, posttraumatic headaches and he also has,

[5]going back to his left leg, pain, weakness, paraesthesias, which

[6]would be like pins and needles type of sensation, sensory loss,

[7]which is the decreased feeling and antalgic gait, which is the

[8]limping.

[9]Q Doctor, do you have any opinion with a reasonable

[10]degree of medical certainty regarding Mr. Reyes's prolonged

[11]walking or standing in everyday life?

[12]A Yes, he should avoid prolonged walking or standing,

[13]those are things that will significantly aggravate his symptoms.

[14]Q Doctor, in your opinion within a reasonable degree of

[15]medical certainty will Mr. Reyes need any future medical care?

[16]A Yes, **[*25]** he will.

[17]Q Please explain.

[18]A Sure. He needs first, starting with the doctors, he

[19]would need to see either a physiatrist or a neurologist managing

[20]his brain injury issues in particular, that I would recommend he

[21]needs four to six times a year and the doctor visits would

[22]average $ 150 per visit in today's dollars.

[23]With his orthopedic injuries he would also benefit from

[24]followup with an orthopedist or other musculoskeletal specialist

[25]three to four times a year for $ 150 per visit.

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[1]He would need physical therapy on average per year he

[2]would need about 24 to 36 sessions per year and that would cost

[3]$ 125 per session in today's dollars.

[4]He would benefit from visits with a neuropsychologists

[5]like Dr. Shea weekly for six months, then twice a month for

[6]another six months. Those visits would also be averaging about

[7]$ 150 per advice.

[8]He would need pain medication, at a minimum he should

[9]be on a prescription strength nonsteroidal antiinflammatory drug

[10]that would be something like Celebrex or Voltaran, that would

[11]typically cost about 25 to $ 30 per month for the medication. **[*26]**

[12]And in terms of resting, he would also benefit from a

[13]followup electromyography or EMG and nerve conduction studies,

[14]that was a test that was done previously that showed the

[15]peroneal neuropathy on a test as opposed to the clinical exam

[16]that I did, in one to two years to followup on that injury to

[17]see what's going on with it and the cost for that testing would

[18]be about $ 1,500

[19]Q Doctor, these costs that you just told us about and the

[20]medical care that you recommend is that your opinion with a

[21]reasonable degree of medical certainty?

[22]A Yes.

[23]Q Doctor, I would like to you assume that a couple of

[24]days ago Dr. Baum was here and testified he was a treating

[25]orthopedist and surgeon and he told us that Mr. Reyes reached
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[1]maximum medical improvement and would not need any more physical

[2]therapy. How come your opinion is different from his?

[3]A Because I think we're looking at two different aspects

[4]of the case. In terms of his fractures further physical therapy

[5]is not going to change anything about the fractured tibia and

[6]fibula so in that regard I would agree. He's reached his

[7]maximum **[*27]** medical improvement as far as the fractures go and that

[8]the therapy isn't needed for that. However, he does have the

[9]long term effects of the soft tissue injuries, he had an ankle

[10]dislocation in addition to the fractures, he had the nerve

[11]injury and he has chronic pain with resulting limp because of

[12]the combination of injuries that happened to his left lower leg.

[13]So he therefore is expected to have flare-ups of pain where his

[14]symptoms are worse than usual and that's where the physical

[15]therapy would come in.

[16]I would agree yes, he has reached maximum medical

[17]improvement in terms of the leg injuries, which is a fancy way

[18]for saying it's not going to get better but the therapy would be

[19]for dealing with some of the aftereffects, when his pain gets

[20]worse, if he overdoes it walking one day he has to get some

[21]therapy to address that. So that's where he would have the need

[22]for the physical therapy, even though he's not going to get

[23]better from it.

[24]Q I also want you to assume that Dr. Shea testified

[25]yesterday and he testified in his opinion that Mr. Reyes would
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[1]need future neuropsychological care and **[*28]** he estimated it at two

[2]years, you just told us one year, why the difference?

[3]A Well, my recommendation is for one year, which is I

[4]think the basic regimen that you would give someone like this.

[5]I could certainly see if someone was continuing to show benefit

[6]at the end of the year you might want to continue it for perhaps

[7]another year, so it's not an unreasonable thought to do so, but

[8]I think he needs at least that one year and then at that point

[9]he could be reevaluated and potentially could have another year.

[10]Q Doctor, in your field do you sometimes deal with other

[11]well intentioned doctors that sometimes have different opinions

[12]about treatment plans?

[13]A Sure, it happens all the time.

[14]Q You mentioned I believe it was nonsteroidal

[15]medications?

[16]A Yes.

[17]Q What does that mean?

[18]A That's a category of drugs which do have

[19]antiinflammatory properties, that's where that part of the name

[20]comes from, they are not steroids, which is where another part

[21]of their name comes from. And these drugs are antiinflammatory

[22]drugs, they are not narcotics or opioid medicines, therefore

[23] **[*29]** they are sometimes preferred in a patient with a brain injury

[24]because they're not going to interfere with the person's

[25]thinking, they don't make them sleepy. So that would be
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[1]typically a preferred kind of medicine to give someone who has

[2]an orthopedic injury and also a brain injury. And they are

[3]available, you can get over-the-counter versions of them.

[4]People might be familiar with Aleve is a brand that gets

[5]advertised a lot. That's a very small dose, not a prescription

[6]strength. What I am talking about is a prescription strength

[7]stronger drug, something like, for example, Celebrex or Voltaran

[8]or Relafen. There's dozens of drugs in this family.

[9]Q You mentioned earlier that Mr. Reyes would need a

[10]followup EMG in one to two years. Please explain the reason why

[11]he needs a followup EMG?

[12]A Because we like to know what's happening with this

[13]nerve. If he is having worsening of the condition it might even

[14]warrant orthopedic exploration of where the nerve passes around

[15]the knee on the outer side, it might warrant doing some bracing

[16]at some point, it might guide some variations in the physical

[17] **[*30]** therapy.

[18]MR. WITTENSTEIN: Thank you, I have nothing

[19]further at this time.

[20]MR. KEHOE: May I proceed, your Honor?

[21]THE COURT: You want to proceed or take a recess?

[22]MR. KEHOE: Whatever your Honor suggests.

[23]THE COURT: We'll take a five minute recess.

[24](Whereupon, the jury left the courtroom.)

[25]THE COURT: We'll take five minutes.
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[1]MR. WITTENSTEIN: Doctor, I am not going to talk

[2]to you during the break because you are still on the stand.

[3]THE WITNESS: Yes.

[4](Recess taken.)

[5](Whereupon, the jury entered the courtroom.)

[6]THE CLERK: Let the record reflect the presence

[7]and proper seating of the jury.

[8]THE COURT: Thank you. Cross-examination.

[9]CROSS EXAMINATION

[10]BY MR. KEHOE:

[11]Q Good morning, doctor.

[12]A Good morning.

[13]Q My name is James Kehoe, I am an attorney representing

[14]the defendants who are being sued in this lawsuit. I will just

[15]ask you a few questions, okay?

[16]A Sure.

[17]Q Your first involvement with this case was February

[18]17th, 2012?

[19]A Actually, February 15th.

[20]Q 15th, okay.

[21]Then **[*31]** you generated the report on February 17th, 2012?

[22]A Yes.

[23]Q Correct?

[24]A Yes.

[25]Q And that -- those two days are -- other than coming
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[1]here today are your only involvement with this case, correct?

[2]A Yes.

[3]Q Am I correct that your involvement with the case is not

[4]with the plaintiff himself, correct?

[5]A Yes.

[6]Q So in other words, the plan you told us about you have

[7]no expectation that the plaintiff would ever follow that plan,

[8]do you?

[9]MR. WITTENSTEIN: Objection as to the doctor's

[10]expectation.

[11]THE COURT: Sustained.

[12]Q You told us about your credentials, that in your real

[13]practice of medicine you work with real patients, correct?

[14]A Yes.

[15]Q And when you work with real patients, when you

[16]formulate a treatment plan, do you have an expectation between

[17]the communication between you and your patients that they may

[18]follow the plan that you put into effect?

[19]A Yes.

[20]Q And so the question here is, do you have any

[21]expectation that the plaintiff is going to follow your treatment

[22]plan?

[23]A I think that's what he needs. **[*32]**

[24]Q I didn't say that. Do you have any expectation that he

[25]would follow this plan you told us about?
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[1]A I never know specifically what someone else is going to

[2]do in the future.

[3]Q Well doctor, that's correct, but do you have any

[4]expectation --

[5]MR. WITTENSTEIN: Objection, your Honor.

[6]Q Do you have an expectation that he would follow your

[7]plan?

[8]MR. WITTENSTEIN: Objection.

[9]THE COURT: Sustained. Asked and answered.

[10]Q In your real practice when you have somebody who is

[11]injured do you get the family involved with them?

[12]MR. WITTENSTEIN: Objection, your Honor.

[13]THE COURT: Overruled.

[14]A When possible, yes.

[15]Q In other words, you talked to us about you go to

[16]rehabs -- you work in rehab centers?

[17]A Yes.

[18]Q And you have family members that come?

[19]A Sure.

[20]Q Sometimes choices are made between the family about

[21]whether a patient should be treated at home or treated in a

[22]rehab center, correct?

[23]A Yes.

[24]Q You work with the patient's family?

[25]A When possible.

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[1]Q Okay, in your real practice **[*33]** you do. Did you ever

[2]communicate with any of the patient's family members?

[3]A In my practice, sure.

[4]Q No, I am talking about relative to this case, did you

[5]communicate with them?

[6]A No.

[7]Q Did you have any expectation that your report was going

[8]to be sent to his parents --

[9]MR. WITTENSTEIN: Objection to what his

[10]expectations are, your Honor.

[11]THE COURT: Sustained.

[12]Q Did you send a report to any member of the patient's

[13]family, yes or no?

[14]A No.

[15]Q Did you send your report -- strike that.

[16]Were you aware that at a particular time that Dr. Baum

[17]was an orthopedist who treated the plaintiff?

[18]A Yes.

[19]Q You are aware that there was a period of time that he

[20]was the plaintiff's treating orthopedist, do you understand

[21]that?

[22]A Yes.

[23]Q And Dr. Baum considers himself still the treating

[24]orthopedist of the patient, do you understand that?

[25]A Yes.
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[1]Q Did you send your report to Dr. Baum?

[2]A No.

[3]Q Did you review his testimony, the transcript, about

[4]his -- what he said about what his expectations **[*34]** for treatment of

[5]the plaintiff were?

[6]A Transcripts, no.

[7]Q You heard a hypothetical that he said he does not need

[8]any orthopedic treatment?

[9]A Yes.

[10]Q You disagree with him?

[11]A Correct.

[12]Q Are you aware that plaintiff was under the care for a

[13]period of time with a neurologist, Dr. Hausknecht?

[14]A Yes.

[15]Q Are you aware that he did not testify that the

[16]plaintiff needed any further treatment?

[17]MR. WITTENSTEIN: Objection, that's not so, your

[18]Honor.

[19]MR. KEHOE: That is so.

[20]THE COURT: Excuse me.

[21]MR. KEHOE: Sorry Judge, I apologize.

[22]THE COURT: Ladies of the jury, it's your

[23]recollection of the testimony that controls here,

[24]regardless of whatever statements are made by the attorneys

[25]in this case. It's your recollection of the testimony of
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[1]the witness that controls.

[2]Overruled.

[3]A I am sorry, the question?

[4]Q The question is, are you aware that Dr. Hausknecht did

[5]not testify that the plaintiff needed any further neurological

[6]treatment?

[7]A Neurological, no. I don't know about that.

[8]Q Pardon **[*35]** me?

[9]A No, I don't know about that.

[10]Q Okay. So did you send your report to Dr. Hausknecht?

[11]A No.

[12]Q Did you review his records and his reports?

[13]A Yes.

[14]Q You reviewed Dr. Baum's records and reports, correct?

[15]A Yes.

[16]Q So you disagree with both of them as far as the

[17]plaintiff has no need for any treatment?

[18]MR. WITTENSTEIN: Objection, foundation to as to

[19]Hausknecht.

[20]THE COURT: Sustained, sustained as to form.

[21]Q Now, you quoted certain fees --

[22]A Yes.

[23]Q -- for various treatment. Have you ever followed a

[24]patient where the patient actually paid those fees?

[25]A Yes.

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[1]Q Don't most of your patients have some type of either

[2]government or private insurance?

[3]A Most do, some don't.

[4]Q And you're telling us that people -- you've had people

[5]that had no insurance and pays all those fees that you just told

[6]us about?

[7]A Well, every person has different needs, they may not

[8]need the exact same plan that Mr. Reyes has, but just in general

[9]yes, I do have patients who pay cash for their medical care.

[10] **[*36]** Q All those fees you've just told us about, you've had

[11]patients --

[12]A Yes.

[13]Q Do you ever deal with patients that have health

[14]insurance and is that within your field?

[15]A Yes, most of my patients fortunately do have insurance.

[16]Q And you can buy health insurance, correct?

[17]A Sure.

[18]Q That would cover that type of treatment, correct?

[19]A It might, yeah.

[20]Q Can you tell the jury or us what --

[21]MR. WITTENSTEIN: Objection, collateral source.

[22]THE COURT: Sustained.

[23]Q Do you have any experience of what it would cost to

[24]get -- if someone wanted to buy insurance --

[25]MR. WITTENSTEIN: Objection.

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[1]THE COURT: Sustained. Sustained.

[2]Q Were you asked to give an opinion as to what the cost

[3]of treatment that you feel in your report is appropriate to the

[4]plaintiff about going out and getting a policy --

[5]MR. WITTENSTEIN: Objection.

[6]THE COURT: Sustained.

[7]Q The report that you wrote, am I correct that you

[8]addressed it to Mr. Wittenstein's office, correct?

[9]A Yes.

[10]Q Your report and your work has nothing to do with **[*37]** the

[11]treatment of the plaintiff, just this case?

[12]A Yes.

[13]Q Are you aware that on the last visit with Dr. Baum he

[14]gave the plaintiff free medication, samples, and told him if he

[15]had any pain to call back and get further, are you aware of

[16]that?

[17]A I did see that he was giving samples, yes, yes.

[18]Q Are you aware that Dr. Baum never received any followup

[19]phone call from the plaintiff requesting any further pain

[20]medication?

[21]A Not that I know of.

[22]Q You still feel that he would need pain medication and

[23]medication every month, correct?

[24]A Yes.

[25]Q The cost and fees, is that up in Stamford, Connecticut?
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[1]A No, that's nationwide.

[2]Q Are you aware that the plaintiff's family is in Mexico?

[3]MR. WITTENSTEIN: Objection.

[4]THE COURT: Sustained.

[5]Q Do you know what the cost of treatment, if the

[6]plaintiff went back to his family in Mexico, what that would be?

[7]MR. WITTENSTEIN: Objection.

[8]THE COURT: Sustained.

[9]Q Do you have an expectation that the plaintiff is going

[10]to stay in Stamford or New York and get that treatment?

[11] **[*38]** MR. WITTENSTEIN: Same objection.

[12]THE COURT: Sustained.

[13]Q Oh, now when you generally work with real patients

[14]don't you have like health care proxies and power of attorneys

[15]and things like that?

[16]MR. WITTENSTEIN: Objection, relevance.

[17]THE COURT: Sustained.

[18]Q If someone needs help in deciding their medical

[19]treatment is it part of your practice to make sure they have the

[20]appropriate health care proxies and Power of Attorney forms in

[21]place?

[22]MR. WITTENSTEIN: Objection.

[23]THE COURT: Sustained.

[24]Q Does the plaintiff have a health care proxy, do you

[25]know?
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[1]MR. WITTENSTEIN: Objection, your Honor.

[2]THE COURT: Sustained.

[3]Q Did you ever prescribe the plaintiff medication?

[4]A No.

[5]Q I see you are wearing glasses?

[6]A Yes.

[7]Q Do you know if the plaintiff ever had his eyes

[8]examined?

[9]A No.

[10]Q If you have poor vision and you don't have your eyes

[11]examined --

[12]MR. WITTENSTEIN: Objection, beyond the scope.

[13]MR. KEHOE: Strike that.

[14]Q Do you have the history of the plaintiff reporting to

[15]you headaches? **[*39]**

[16]A Let me check. Yes.

[17]Q Do you know when the last time -- he gets it while he

[18]watches television, did you ever get that history?

[19]A No, he told me that they were made worse by riding in a

[20]car.

[21]Q By what?

[22]A Riding in a car, he mentioned, was something that makes

[23]them worse.

[24]Q Do you know if he's had any treatment for that

[25]condition?

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[1]A No.

[2]Q Have you ever had a headache personally?

[3]A Personally, yes.

[4]MR. WITTENSTEIN: Objection.

[5]THE COURT: Sustained.

[6]Q Do you know if the plaintiff had taken so much as an

[7]aspirin or Tylenol for treatment of headache?

[8]A No.

[9]Q Did you do any neurological testing of the plaintiff

[10]other than the left nerve -- left lower leg?

[11]A I did a neurological physical exam, but no other tests.

[12]Q What did that consist of?

[13]A Manual muscle testing, testing his strength; and

[14]sensation testing, using the filament that I talked about

[15]before.

[16]Q Are there doctors, to your knowledge, in Queens County

[17]that have the same expertise as you, maybe not as good, the same

[18]qualifications? **[*40]**

[19]MR. WITTENSTEIN: Objection, your Honor.

[20]THE COURT: Sustained.

[21]Q You don't practice in New York now, do you?

[22]A No.

[23]Q So would I be correct if the plaintiff were to treat

[24]you he would have to go to Stamford, Connecticut?

[25]A He would have to see me to see in my office, as I do
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[1]with many of my patients that live in New York give them a

[2]prescription, then he can go for therapy or get medication,

[3]prescriptions filled in New York.

[4]Q Has there been any followup between you and the

[5]plaintiff since February 17th, 2012?

[6]A No.

[7]Q Is there any indication that the plaintiff had any

[8]rehabilitation inpatient after he was discharged from Elmhurst

[9]Hospital shortly after this accident?

[10]A As an inpatient, no.

[11]Q When, to your understanding from your review of the

[12]plaintiff's record, was the first time ever the plaintiff made

[13]any complaints of head injury after he got out of the hospital?

[14]A After he got out of the hospital?

[15]Q Yes.

[16]A I believe as far as what's documented, it's when he

[17]went to see Dr. Shea or Dr. Hausknecht.

[18] **[*41]** Q Am I correct that that's at least a year and-a-half

[19]after the accident?

[20]A Yes.

[21]Q Is that significant, doctor, that the patient could

[22]be -- could have a year and-a-half of no complaints about any

[23]head injury or any headaches, then after he went to a doctor

[24]that his lawyers recommended that now he starts getting

[25]headaches?

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[1]MR. WITTENSTEIN: Objection, your Honor.

[2]THE COURT: Sustained as to form.

[3]Q Is the timeframe significant, from the date of the

[4]accident to the first complaint of any headache, significant to

[5]you?

[6]MR. WITTENSTEIN: Objection to foundation, your

[7]Honor.

[8]THE COURT: You understand the question, doctor?

[9]THE WITNESS: I think I do, yes your Honor.

[10]THE COURT: Overruled.

[11]A I don't know that he didn't have any complaint of

[12]headache, all I know is what I am saying as far as what I can

[13]review from the records the first documented complaints in the

[14]records available to me were when he saw Dr. Hausknecht and Dr.

[15]Shea and their colleagues. What's significant to me is if he's

[16]still symptomatic over a year later this is not just a

[17] **[*42]** concussion which many people get then they get better and go

[18]back to themselves but an actual brain injury.

[19]Q You don't know what, if anything -- you understand the

[20]date of the accident that's the subject of this lawsuit is May

[21]of 2009 correct?

[22]A Yes.

[23]Q You have no reference of what, if anything, might of

[24]transpired in the plaintiff's life between the day of this

[25]accident and the first visit to Dr. Hausknecht or Dr. Shea about
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[1]a year and-a-half later, do you?

[2]A Correct.

[3]Q Am I correct that you were not retained to render any

[4]opinion as to the mechanisms of the actual accident and the

[5]injuries?

[6]A That's right.

[7]Q Do you have any training in accident reconstruction?

[8]A No.

[9]Q Do you know what the plaintiff's intelligence level was

[10]prior to him -- prior to the accident?

[11]A His intelligence level, no.

[12]Q Do you know what his ability to follow instructions was

[13]prior to the accident?

[14]A I know that he was able to hold down a job so I can

[15]infer that he had better ability than what he has now but I

[16]don't know exactly what that was. **[*43]**

[17]Q Where did you get the information that he held down a

[18]job?

[19]A From him, he gave me a vocational history.

[20]Q If someone comes to you with headaches, complaints of

[21]headaches, you give them direction of how to initially treat it,

[22]see if they can do anything to it?

[23]A Yes, sure.

[24]Q What would be your initial treatment if I said I have

[25]headaches, for instance hypothetically, someone says I get a
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[1]headache if I watch TV for too long a time?

[2]A If someone's related their headache to watching TV for

[3]too long a time, in generally I would have a concern about a

[4]visual problem. If someone has a history of traumatic brain

[5]injury, then I would definitely have a concern that they may

[6]have problems with the coordination of the two eyeballs not

[7]moving smoothly together, which is something we see quite a lot,

[8]particularly in mild traumatic brain injury.

[9]Q My question is not how it was caused but if somebody

[10]came up to you would you recommend initial preliminary treatment

[11]such as check your eyes, would that be something you may do?

[12]A I would not check someone's eyes the **[*44]** way that an

[13]ophthalmologist would do, I would look much in a similar way

[14]that a neurologist would typically do to ask them to follow my

[15]finger moving and some things like that, but I would not do an

[16]eye exam beyond that.

[17]Q In your experience if you needed glasses and you are

[18]straining watching TV --

[19]MR. WITTENSTEIN: Objection, well beyond the

[20]scope.

[21]Q -- could that be one of the initial problems?

[22]THE COURT: Overruled.

[23]A Could that cause headaches?

[24]Q Could that be one of the initial reasons you get

[25]headaches because you need glasses?
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[1]A That's possible, sure.

[2]Q Couldn't the symptoms be relieved with something as

[3]simple as Tylenol or aspirin?

[4]A For some people, sure.

[5]Q Do you know if the plaintiff ever tried any of those

[6]simple solutions?

[7]A No, I don't.

[8]Q Did you recommend for him to try any of those simple

[9]solutions?

[10]A I did not make any recommendations to him.

[11]Q What is your experience or expertise with respect to

[12]orthopedics, and especially the lower extremities?

[13]A I treat a lot of patients with **[*45]** orthopedic injuries to

[14]the lower extremities.

[15]Q I know you see a lot of patients but do you consider

[16]yourself a lower extremity expert?

[17]A Sure.

[18]Q Are you familiar with Dr. Baum?

[19]A Not personally.

[20]Q Do you know his qualifications as an orthopedist?

[21]A Not specifically, no.

[22]Q Do you know, are you aware, that he is -- he has

[23]training and specialized courses and advanced training just in

[24]the lower extremities?

[25]A I don't know what his training is, I'm sure he did.
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[1]Q Assuming that he testified to that, would you disagree,

[2]would you still feel your opinion is better than his?

[3]A When it comes to rehabilitation, yes. When it comes to

[4]operating, no.

[5]Q How about postoperation treatment?

[6]A When it comes to rehab, orthopedists frequently turn

[7]such patients over to physiatrists like myself, so I would say

[8]we have very comparable expertise in terms of postop

[9]rehabilitation.

[10]And in terms of the long term rehab, the stuff that

[11]goes on years later, those patients are much more likely to see

[12]someone like me, than someone like him. **[*46]**

[13]Q In other words, it's your opinion if the plaintiff went

[14]to someone like you he could be rehabilitated better than just

[15]staying with the orthopedist?

[16]A No, I am not saying that. I am saying in terms of the

[17]long term care, once orthopedists can no longer realistically

[18]offer someone further surgery they would routinely turn it over

[19]to someone like myself, a physiatrist.

[20]Q You understand that Dr. Baum testified under oath to

[21]this jury that in his opinion the plaintiff did not need any

[22]further or would not benefit from any further medical treatment

[23]with respect to his leg injury?

[24]A Yes, I understand.

[25]Q You accept that. And it's your opinion that you
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[1]disagree with that?

[2]A Yes, I think that in the future, not necessarily right

[3]now, but in the future he is going to need more physical

[4]therapy.

[5]Q So when do you expect -- when in your opinion should

[6]plaintiff start having the physical therapy again?

[7]A Whenever he has a flare-up of his pain would be when he

[8]would need to have his next sessions.

[9]Q And you heard testimony from Dr. Baum -- or assume

[10] **[*47]** there was testimony that Dr. Baum did not get any post followup

[11]calls from the plaintiff that he was having any pain, so in your

[12]opinion based on that you would say he does not need physical

[13]therapy?

[14]A Not at this moment.

[15]Q Okay. So all of those opinions you gave us, and the

[16]amounts and things like that you talk about, may not figure in

[17]for some time in the future?

[18]A Perhaps.

[19]Q You don't know when he would need that treatment?

[20]A Not exactly when, no.

[21]Q So it's pure speculation what you're telling the jury

[22]about all this amount of therapy and treatment that you feel

[23]that the plaintiff needs?

[24]A No, it's not speculation, it's based on my experience

[25]with patients over the years with similar injuries back in the
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[1]past.

[2]Q But you've said you can't give a definitive answer when

[3]the plaintiff would need to begin any of this stuff?

[4]A Not as to exactly when, but what he is going to need on

[5]average going forward.

[6]Q You don't know when that is going to begin, correct?

[7]A No.

[8]Q As a rehabilitation expert, do you have an expectation,

[9] **[*48]** if the plaintiff followed your instructions, that he would be

[10]able to rehabilitate himself?

[11]A I expect that that would help to give him a better

[12]quality of life, to help him be more functional in his

[13]activities of daily living, but it wouldn't bring him back to

[14]normal.

[15]Q You have no knowledge independently of what his

[16]pre-accident normal, quote unquote, normal condition was?

[17]A As far as I know he never had any fractures or injuries

[18]to his leg and he was walking around and working on that leg, so

[19]that's what I do know about his leg.

[20]MR. KEHOE: Thank you very much.

[21]THE COURT: Thank you. Redirect.

[22]MR. WITTENSTEIN: Thank you, your Honor.

[23]REDIRECT EXAMINATION

[24]BY MR. WITTENSTEIN:

[25]Q Doctor, I would like to you assume Mr. Reyes was here
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[1]the other day and testified that it took him one hour to walk

[2]from his apartment to his brother's apartment, including rest

[3]breaks --

[4]MR. KEHOE: Objection.

[5]THE COURT: Overruled.

[6]Q -- is that normal?

[7]A No, it's not. In terms of walking city blocks, most

[8]people can walk about a block a minute, so in **[*49]** an hour they would

[9]walk about 60 blocks, I am talking about a healthy, normal sized

[10]person. So that's very slow.

[11]Q What if I also told that you Mr. Reyes testified just

[12]the other day he had to walk up the steps to the courthouse, the

[13]front entrance and he had pain, what does that tell you about

[14]his left leg?

[15]MR. KEHOE: Objection.

[16]THE COURT: Overruled.

[17]A That's also significant. I walked up the flight of

[18]steps myself this morning, so I know what you're talking about

[19]and that should not normally hurt a healthy person.

[20]Q Would having an IM rod in his left leg have anything to

[21]do with that, sir?

[22]MR. KEHOE: Objection.

[23]THE COURT: Overruled.

[24]A It very well may be. Sometimes after people have these

[25]orthopedic repairs with what we call hardware, sometimes the
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[1]hardware itself can be a source of pain.

[2]Q I want you to also assume that Mr. Reyes testified that

[3]after walking a few blocks he had to stop and take a break

[4]before he resumes, what does that tell you about his left leg,

[5]sir?

[6]MR. KEHOE: Objection.

[7]THE COURT: Overruled.

[8] **[*50]** A Also abnormal. Walking a few blocks, someone's leg

[9]shouldn't hurt.

[10]Q Doctor, I want you to assume that Mr. Reyes testified

[11]that he's not on welfare and accepts no benefits from the United

[12]States government or the State of New York, did --

[13]MR. KEHOE: Judge, I object.

[14]THE COURT: Counsel approach.

[15](Whereupon, discussion held off the record.)

[16]THE COURT: Overruled.

[17]MR. WITTENSTEIN: Thank you, your Honor.

[18]Q As I was saying doctor, I want you to assume Mr. Reyes

[19]testified he's not on welfare, doesn't get food stamps, gets no

[20]benefits from the United States government, gets no benefits

[21]from the State of New York, he sleeps on a mattress on a

[22]floor --

[23]MR. KEHOE: Objection.

[24]THE COURT: Sustained as to form.

[25]MR. WITTENSTEIN: I will rephrase.
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[1]Q I want you to assume that Mr. Reyes doesn't get

[2]welfare, doesn't get food stamps, gets no government benefits

[3]whatsoever and he has not worked since the day of the accident?

[4]A Okay.

[5]Q Do you have an opinion about Mr. Reyes's ability to pay

[6]for future health care needs?

[7]A Yes.

[8] **[*51]** Q Tell us?

[9]A He would not have the ability to pay for future health

[10]care needs, the costs are significant, they are what they are,

[11]if he doesn't have a source of income, if he doesn't have

[12]government benefits, even if he had the money to go out and buy

[13]a commercial insurance plan those would exclude his preexisting

[14]conditions so he couldn't pay for it.

[15]Q Doctor, if Mr. Reyes did not call Dr. Baum or Dr.

[16]Hausknecht to complain about headaches does that mean he wasn't

[17]having any?

[18]A No.

[19]Q Do you have any reason to believe that Mr. Reyes was

[20]able to pay any out of pocket expenses for any of his medical

[21]care as a result of this accident?

[22]A No.

[23]MR. WITTENSTEIN: I have nothing further.

[24]THE COURT: Thank you.

[25]Recross?
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[1]MR. KEHOE: Yes.

[2]RECROSS EXAMINATION

[3]BY MR. KEHOE:

[4]Q Are you aware that the patient had -- Mr. Reyes had

[5]insurance that covered his medical treatment?

[6]MR. WITTENSTEIN: Objection.

[7]THE COURT: Sustained.

[8]MR. KEHOE: Pardon me?

[9]THE COURT: Sustained. There's an objection.

[10]Q Do you know how **[*52]** the patient's medical treatment that he

[11]had in the past was paid for?

[12]MR. WITTENSTEIN: Objection.

[13]THE COURT: Sustained.

[14]MR. KEHOE: I have no further questions then,

[15]Judge.

[16]THE COURT: Thank you doctor, you may step down.

[17]THE WITNESS: Thank you, your Honor.

[18]THE COURT: Counsel, approach.

[19](Whereupon, discussion held off the record.)

[20]THE COURT: We'll take a five minute recess.

[21](Whereupon, the jury left the courtroom.)

[22]MR. WITTENSTEIN: Before you took the bench we had

[23]an exhibit marked for identification. I want to bring it

[24]to your attention because I will be attempting to use it

[25]during my direct exam. This is Plaintiff's 17 for
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[1]identification. Mr. Kehoe's already seen this. We have

[2]the economist and I expect to ask the economist to use this

[3]chart beginning from day one to the end to explain the

[4]different categories of costs and inflation rate and how

[5]the expenses change from on year to year basis.

[6]Your Honor, I also brought a proposed verdict

[7]sheet with me.

[8]THE COURT: Yes, I'll take it.

[9]MR. WITTENSTEIN: My request **[*53]** to charge I didn't

[10]finish because there was a lot of stuff.

[11]THE COURT: Okay.

[12]MR. WITTENSTEIN: I will give Mr. Kehoe a copy

[13]too.

[14]THE COURT: When can I expect yours, Mr. Kehoe?

[15]MR. KEHOE: Judge, I will e-mail it to your law

[16]secretary tomorrow and e-mail it to counsel at the same

[17]time.

[18]MR. WITTENSTEIN: This is for the judge.

[19](Handing.)

[20]THE COURT: We won't be here tomorrow but you can

[21]e-mail it at any time.

[22]My law secretary is on her honeymoon, that's why

[23]we gave you my e-mail address of my secretary Ms. Miller.

[24]MR. KEHOE: I have it, Judge.

[25](Recess taken.)
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[1]MR. KEHOE: I object to this next witness being

[2]called because this witness's testimony is entirely based

[3]on the plaintiff's last witness as to future medical

[4]expenses and that witness very clearly on cross-examination

[5]says he has no idea when the plaintiff will begin or need

[6]to have any future medical attention so I don't see how an

[7]economist can set forth any opinion. He gave amounts that

[8]the jury is well able to give their opinion of, but I don't

[9]believe that a witness is qualified **[*54]** now to form any opinion

[10]that's beginning on day one, or day one after the verdict.

[11]And that's why -- I disagree with it, so I feel this

[12]witness is totally inappropriate to be called for her to

[13]give a number without any starting date and the doctor said

[14]it was pure speculation when the plaintiff would ever begin

[15]needing this treatment.

[16]THE COURT: Let me ask you this, if the doctor's

[17]opinion to a reasonable degree of medical certainty is that

[18]he cannot specify a specific date in the future in which

[19]the plaintiff may or will -- will need those services, that

[20]means that the plaintiff is not entitled to get medical

[21]expenses?

[22]MR. KEHOE: That's correct, Judge, because if he

[23]said, he was never asked, if he said I don't know when, in

[24]my opinion in all likelihood he will begin needing this

[25]five years from now and I would definitely say it could be
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[1]five years to ten years, then there's some basis for the

[2]doctor to render an opinion. This doctor said he has no

[3]idea when if ever he will ever begin needing this. So

[4]you're asking the jury now to purely speculate now and have

[5]an economist tell them **[*55]** from day one this is what it will

[6]be.

[7]THE COURT: I guess my question is, if the doctor

[8]within a degree of medical certainty can't be specific,

[9]that's the extent of what the medical testimony or opinion

[10]can be, his testimony is I expect it to happen but I can't

[11]say a specific date, based upon all the other facts, so

[12]that in that particular case your argument is he is not

[13]entitled to future medical expenses? You understand my

[14]question?

[15]MR. KEHOE: And I agree with your Honor, only

[16]because if he -- knowing the day he would begin is not --

[17]but he could say no, I can't say if he's going to need it

[18]tomorrow, but in my opinion he will need it based on my

[19]experience I anticipate or I give opinion that he will

[20]begin to need it somewhere between one and three years in

[21]the future something like that, that line of questioning

[22]was never raised.

[23]THE COURT: So you're saying there is no evidence

[24]as to a date even though it's an indefinite date here in

[25]this case?

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[1]MR. KEHOE: Yeah, he never gave that opinion.

[2]MR. WITTENSTEIN: Well your Honor --

[3]THE COURT: For the plaintiff. **[*56]**

[4]MR. WITTENSTEIN: I will be very brief, your

[5]Honor. Mr. Kehoe must of forgotten some of the testimony.

[6]Mr. Richter said when the pain flares up that's when he has

[7]to begin. There's been plenty of testimony from Mr. Reyes

[8]that he's had plenty of pain before today. In fact, Mr.

[9]Reyes obviously needed physical therapy before the day he

[10]testified in court. Mr. Reyes testified when he walked up

[11]those front steps of the courthouse he was in pain. He

[12]testified when he walks down the basement steps to his

[13]apartment he is in pain. So pain has been flaring up, so

[14]if we're talking about a starting point when therapy

[15]begins, the doctor testified when pain flares up. There's

[16]been plenty of testimony about pain flaring up, there's

[17]been plenty of testimony about constant pain. Mr. Reyes

[18]never said at any point he's in no pain.

[19]THE COURT: I think there is at least sufficient

[20]evidence in the record for the jury to determine, not for

[21]the court to determine, whether or not a point in time has

[22]been reached in which his suggested future medical expenses

[23]would be right for -- to be incurred. I take this

[24]testimony, **[*57]** and understand his testimony, he was not able to

[25]specify a date certain as to when that medical expense

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[1]would be right to be incurred but I think there's

[2]sufficient evidence in the record for the jury to make a

[3]determination, that it's not based upon pure speculation.

[4]So the application to preclude the witness is denied.

[5]MR. KEHOE: Your Honor is distinguishing between

[6]pure speculation and mere speculation, isn't that the same

[7]thing?

[8]THE COURT: No -- yes it is but I am not -- but

[9]what I said is, I don't believe his testimony with regard

[10]to future medical expenses and the date in which -- a date

[11]specific in which those medical expenses would be right for

[12]the plaintiff, I don't believe should the jury decide that

[13]plaintiff is entitled to that it will be based on pure

[14]speculation.

[15]There is evidence from the expert witness that

[16]those expenses, to a reasonable degree of medical certainty

[17]will occur. As to the specific date, the witness was

[18]unable to say that but, and I agree with counsel for

[19]plaintiff that there was testimony about those medical

[20]expenses would be right at the **[*58]** time the plaintiff incurs

[21]pain, so that would be a date certain.

[22]So you take all the testimony together with the

[23]evidence and the jury would have a basis to determine when

[24]it would be right for the medical expenses. I don't find

[25]it to be speculative, taken in its totality.

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[1]Parties ready to proceed?

[2]MR. WITTENSTEIN: Yes, your Honor.

[3]THE COURT: Just for my edification, the document

[4]that's marked as Plaintiff's Exhibit 17 for identification,

[5]are you going to be offering that into evidence?

[6]MR. WITTENSTEIN: I will be offering it into

[7]evidence. And if by some chance your Honor will not permit

[8]me to put it into evidence, I will be offering it for

[9]illustration purposes. It would probably be a good idea if

[10]we had an easel too. Thank you.

[11]THE COURT: Ready for the jury.

[12](Whereupon, the jury entered the courtroom.)

[13]THE CLERK: Let the record reflect that the jury

[14]is present and properly seated.

[15]THE COURT: Thank you, please be seated.

[16]Plaintiff, you may call your next witness.

[17]MR. WITTENSTEIN: Thank you, your Honor. I call

[18]Debra Dwyer. **[*59]**

[19]D E B R A D W Y E R, called as a witness by

[20]and on behalf of the Plaintiff having been first duly

[21]sworn, was examined and testified as follows:

[22]THE CLERK: In a loud, clear voice state your name

[23]and address for the record.

[24]THE WITNESS: My name is Debra Dwyer, D-E-B-R-A,

[25]D-W-Y-E-R.
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[1]THE COURT: You may inquire, counsel.

[2]DIRECT EXAMINATION

[3]BY MR. WITTENSTEIN:

[4]Q Good afternoon, Ma'am.

[5]A Good afternoon.

[6]Q What is your occupation?

[7]A I am an economist.

[8]Q What is an economist?

[9]A That's a big question. An economist is somebody who

[10]studies how we allocate scarce resources and the market. So

[11]what that means is, we do a lot of mathematical modelling and

[12]statistics to understand why things are the way they are around

[13]us in terms of prices and all sorts -- our economic well-being.

[14]Q Can you please tell us about your current position?

[15]A Currently I am the Chairman of the Department of

[16]Healthcare Policy And Management at Stony Brook University.

[17]I've been there since 2006, so about six years.

[18]Before that I spent eight years **[*60]** in the economics

[19]department at Stony Brook University.

[20]Q Can you please tell us about some of your relevant past

[21]employment positions?

[22]A Sure. It started when I got my Ph. D. In 1996, I did a

[23]post doctorate at Syracuse University at the Center For Policy

[24]Research where I compared global health systems. So I compared

[25]the Netherlands health system to the United States.

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[1]Then I went to Washington D.C., I worked for the Social

[2]Security Administration for two years in the Division For

[3]Economic Research, I was a senior economist there.

[4]Then I came to Stony Brook University.

[5]Q In your career and your educational background have you

[6]received any honors or awards?

[7]A I received a full fellowship and assistantship to study

[8]at Cornell University where I got my Masters and my Ph. D.

[9]I graduated from Queens college with honors and I

[10]received a Steven H. Bernheim award for economics, a student in

[11]economics, outstanding student.

[12]I was the president of the Economics Honor Society when

[13]I was undergraduate.

[14]Since then, since I became a professor, I received a

[15] **[*61]** number of grants to do research on Social Security disability

[16]related issues. Currently I am working on grants where I am

[17]working with the governor's office to try to survey public

[18]agencies to figure out what some of the barriers are to getting

[19]worker's compensation injured workers back to work.

[20]I also yesterday I found out that I was ranked top 19

[21]percent of economic researchers in terms of my researches

[22]impact.

[23]Q Thank you.

[24]MR. WITTENSTEIN: Your Honor, at this time I offer

[25]Dr. Dwyer as an expert in the field of economics.

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[1]THE COURT: Other than the stated grounds off the

[2]record for objecting, any objection?

[3]MR. KEHOE: I don't object to her qualifications,

[4]I object to her testimony.

[5]THE COURT: Absolutely. Thank you.

[6]Q Were you engaged to calculate the future healthcare

[7]costs for Mr. Reyes?

[8]A Yes, I was.

[9]Q Did you prepare a chart regarding those healthcare

[10]costs?

[11]A Yes, I did.

[12]Q I am going to show you what's marked Plaintiff's Number

[13]17 for identification. Is this chart basically a blowup of a

[14]chart that you prepared?

[15] **[*62]** A Yes, it is.

[16]Q Will this chart assist you in explaining to the jury

[17]the nature of economic increases of costs of healthcare in the

[18]future?

[19]A Absolutely.

[20]Q Will this assist the jury in understanding the total

[21]cost of future healthcare for Mr. Reyes?

[22]A Yes.

[23]MR. WITTENSTEIN: Your Honor, at this point I

[24]would like to offer this into evidence.

[25]THE COURT: Any objection?

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[1]MR. KEHOE: Yes I object, your Honor.

[2]THE COURT: Counsel approach.

[3](Whereupon, discussion held off the record.)

[4]THE COURT: Sustained. Insufficient foundation.

[5]Q Dr. Dwyer, before you prepared the chart did you review

[6]any type of written documents?

[7]A Yes, I did.

[8]Q What did you review?

[9]A I reviewed the report of Dr. Richter, I think his name

[10]was Dr. Richter.

[11]Q In Dr. Richter's report did he breakdown the different

[12]types of expenses, for example, physiatrist or neurologists?

[13]A Yes, he did.

[14]Q Did he breakdown orthopedic visits?

[15]A Yes, he did.

[16]Q Did he breakdown physical therapy visits?

[17]A Yes, he did.

[18]Q Did **[*63]** he breakdown neuropsychological treatment?

[19]A Yes.

[20]Q Did he breakdown medication?

[21]A Yes.

[22]Q And future EMG testing?

[23]A Yes.

[24]Q Did Dr. Richter give an opinion in his report about the

[25]amount of time that these expenses would be incurred?

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[1]A Yes.

[2]MR. WITTENSTEIN: Your Honor, at this time I would

[3]like to offer this chart into evidence.

[4]THE COURT: Any objection?

[5]MR. KEHOE: I object.

[6]THE COURT: Same objection? Is it the same

[7]objection?

[8]MR. KEHOE: It is, but it's a little further.

[9]THE COURT: Sidebar.

[10](Whereupon, discussion held off the record.)

[11]THE COURT: Sustained.

[12]Q Dr. Dwyer, I would like you to assume that Dr. Richter

[13]testified in this case that Mr. Reyes needs four to six visits

[14]per year with a physiatrist or a neurologist, did you take that

[15]into account when you prepared your chart?

[16]A Yes, I did.

[17]Q I would like to you assume that Dr. Richter testified

[18]in this case that Mr. Reyes needs orthopedic visits of three to

[19]four times a year and he put a price of $ 150 per visit, did you

[20]account **[*64]** for that in your chart?

[21]A Yes, I did.

[22]Q Just going back to the previous question, I would like

[23]to you assume that Dr. Richter also testified it was o per visit

[24]in today's dollars for the physiatrist or the neurologist?

[25]A Yes.

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[1]Q In terms of the cost of the orthopedist, Dr. Richter

[2]also testified it's $ 150 per visit in terms of today's dollars?

[3]A Yes, that's right.

[4]Q I would like you to also assume that Dr. Richter

[5]testified that Mr. Reyes would need future costs of physical

[6]therapy, at a cost of 24 to 36 sessions per year at $ 125 per

[7]session in today's dollars?

[8]A Yes.

[9]Q Did you account for that in your chart?

[10]A Yes.

[11]Q I would like you to assume that Dr. Richter also

[12]testified that Mr. Reyes would benefit from visits with a

[13]neuropsychologist weekly for six months, then twice a month for

[14]six months at $ 150 per visit in today's dollars?

[15]A Yes.

[16]Q Did you take that into account when you prepared the

[17]chart?

[18]A Yes.

[19]Q I would like you to assume that Dr. Richter testified

[20]that there's an anticipated need of **[*65]** analgesic medication, at

[21]least comparable to a prescription strength nonsteroidal

[22]medication costing 25 to $ 30 per month in today's dollars, did

[23]you take that into account when you prepared your chart?

[24]A Yes, I did.

[25]Q I would like to you assume when Dr. Richter testified
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[1]that Mr. Reyes would need a future EMG of 1,500 in today's

[2]dollars one to two years in the future, did you take that into

[3]account when you prepared your chart?

[4]A Yes, I did.

[5]MR. WITTENSTEIN: Your Honor, it's my position I

[6]have laid a proper foundation. I am requesting that this

[7]document Plaintiff's 17 be permitted into evidence.

[8]MR. KEHOE: May I, I have two questions.

[9]VOIR DIRE EXAMINATION

[10]BY MR. KEHOE:

[11]Q Did you take into consideration when you prepared the

[12]chart that Dr. Richter testified he has no idea when --

[13]MR. WITTENSTEIN: Objection, your Honor.

[14]THE COURT: Sustained.

[15]MR. KEHOE: I didn't finish the question, Judge.

[16]THE COURT: I know what it is. Sustained. Thank

[17]you. Thank you. Thank you.

[18]MR. KEHOE: Can I just ask the question, Judge?

[19]THE COURT: **[*66]** You can ask the question on your

[20]cross-examination. It's not proper for voir dire.

[21]In any event, over objection Plaintiff's 17 for

[22]identification is admitted into evidence.

[23](Whereupon, Plaintiff's Exhibit 17, chart of future healthcare

[24]costs, was marked in evidence.)

[25]DIRECT EXAMINATION
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[1]BY MR. WITTENSTEIN: (CONTINUED)

[2]Q Dr. Dwyer, did you perform an economic analysis of Mr.

[3]Reyes's future healthcare costs within a reasonable degree of

[4]economic certainty?

[5]A I did.

[6]Q Dr. Dwyer, if you would be so kind I will ask you

[7]please step down, we'll set up the chart on the easel, I will

[8]ask you some questions.

[9](Whereupon, the witness stepped down from the witness

[10]stand.)

[11]Q Dr. Dwyer, you are probably the only economist in the

[12]room, we'll work through the chart slowly. Beginning in the

[13]upper left where it says 2012 and working down to 2050 can you

[14]explain for us what each column represents?

[15]A Sure. The first column is the number of years from

[16]today starting from 2012 to the expected end of Mr. Reyes's

[17]life. So based on the National Health Statistics Mr. Reyes, **[*67]**

[18]who's currently 38, is expected to live another 38.1 years,

[19]which brings us to 76.1, which brings us to 2050.

[20]So starting in 2012 we calculate the expected medical

[21]expenses for the remainder of his life annually until 2050.

[22]Q Can you please explain as we go down that column why

[23]the numbers keep going up, why the numbers increase?

[24]A Okay, so for the medical expenses what I did was I took

[25]Dr. Richter's report, I am not a medical doctor, I have the
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[1]title of doctor but I am not a medical doctor, so I don't have

[2]the expertise to be able to say what the future medical needs

[3]are going to be for Mr. Reyes given his injuries, so what I did

[4]was I took that report, and I took for the remaining six months

[5]of 2012, so for physiatrist or neurologist five visits per year

[6]at $ 150 per year, so I only did two for 2012, so we were on the

[7]conservative end all the way through, so for 2012 everything is

[8]calculated for six months and it's in current dollars.

[9]We also did current dollars for 2013, we were

[10]consistent -- I mean conservative. For 2013, the reason the

[11]numbers go up in 2013, is now we're **[*68]** calculating a full year for

[12]medical services needed, so it's five physiatrists needed, 3.5

[13]orthopedic visits, so when Dr. Richter said three to four visits

[14]what we did was take the midpoint.

[15]Q I want you to assume Dr. Richter testified it was 4 to

[16]6, why did you choose 5?

[17]A I take the midpoint or I take the lower end. So we try

[18]to be on the conservative side. So if there's uncertainty about

[19]the future medical needs and Dr. Richter says it's between five

[20]and six we're going to be conservative and go with the five. If

[21]it's between 3 and 4, in that case we went for 3.5 visits per

[22]year. We either do the midpoint or the lower end, so we chose

[23]5, we could have done 5.5 for this one. It does affect the

[24]numbers slightly so we underestimate in a lot of cases.

[25]So the 2012 and the 2013 numbers are in current
428

[1]dollars, but as we know inflation hits us and it affects our

[2]purchasing power, so the costs of a neurologist visit is today

[3]is not the same as a neurologist visit 20 years ago. Like the

[4]slice of pizza which runs $ 2 a slice --

[5]MR. KEHOE: Objection, Judge.

[6]THE COURT: Sustained. **[*69]**

[7]A Because of inflation the amount we can buy with the

[8]dollar changes every year, so the amount of medication we can

[9]buy this year is different than the amount of medication we're

[10]going to be able to buy next wear year and the year after that.

[11]So within a reasonable degree of economic certainty we are able

[12]to take projections based on the last 25 years of prices within

[13]each of these categories that we got from the Bureau of Labor

[14]Statistics, so we always use Federal statistics to project our

[15]numbers.

[16]So beginning with the year 2013, I will start with the

[17]neurologist, in 2013 it was 750; in 2014, even though it's still

[18]the same number of visits, the five visits for another year,

[19]it's now worth $ 780 because we're increasing it by four percent

[20]which is what we calculated for general medical expenses on

[21]average for the last 25 years, they've been rising by about 4

[22]percent, so we use overall for the last 25 years medical

[23]expenses have been rising by 5.2 percent for the last 25 years.

[24]We used 4 percent because for neurologists and

[25]physiatrists it was more like 4 percent as opposed to the
429

[1] **[*70]** overall medical inflation. So 750 we increase by 4 percent

[2]becomes 780 in 2014, 811 in 2015. We do this all the way

[3]through. And yes, by 2049 we're at 3,078. So that's how

[4]inflation affects us. It sounds like a lot, but again if you

[5]think about other commodities and how you have been spending

[6]over the last ten years, prices have changed.

[7]For the last year of his life, remember I said he will

[8]live to 76.1 years, so he will only live .1 of a year, and

[9]that's only $ 256 worth of neurologists visits.

[10]Q Doctor, if Mr. Reyes were to live longer than the life

[11]expectancy, would these numbers be even higher?

[12]A That's right.

[13]Q Please continue, doctor.

[14]A I did exactly the same thing for all of the other

[15]categories based on Dr. Richter's report. So for the

[16]orthopedist visit again I did one for 2012, then for 2013, I

[17]went on to 3.5 worth, $ 525 next year, the year after that if I

[18]increase it by four percent again it goes up to 546, and we get

[19]all the way down to $ 2,155 by 2049, and 179 in the remainder --

[20]the remaining year, for a total of $ 43,223 for orthopedists

[21]visits.

[22] **[*71]** So now physical therapy, the rate increase price was

[23]slightly slower than the others, so I used a rate of 3.5

[24]percent. Again these are based on the Bureau of Labor

[25]Statistics. So 30 visits per year, we only did 15 in 2012, 30

430

[1]in 2013 at $ 3,750, if you increase it by 3.5 percent in 2014

[2]it's $ 3,881, get all the way to the end it grows to $ 12,938 in

[3]2049, about an additional $ 1,071 in that last year of life, for

[4]a total of $ 278,413 for physical therapy.

[5]Now the neurologist -- neuropsychologist sorry --

[6]weekly for six months, then two per month for six months, so

[7]he's only predicting a year's worth, so we did the first six

[8]months in 2012 at 3,900, that's for half a year and for 2013 the

[9]remaining of that half a year was every other week at 1,800. We

[10]didn't need to grow this because he's not doing it beyond 2013,

[11]that was not what Dr. Richter prescribed, so 5,700 is the total

[12]for the neuropsychologists visits.

[13]Medications have been rising higher than the general

[14]inflation rates, so we use 4.5 percent for medications, drug

[15]costs, because patents are very high. So based on the

[16]recommendations **[*72]** of Dr. Richter of $ 30 per month we have 165 for

[17]half a year, 330 for the first full year in 2013, we grew it at

[18]4.5 percent every year, so that by the last full year of life

[19]2040 his drug costs are estimated to be $ 1,610, $ 135 add on for

[20]the last year of life, for a total of $ 30,343 worth of

[21]pharmaceuticals.

[22]Then the last one was a one time only EMG at 1,500,

[23]which didn't need to be grown since it's happening next year, so

[24]total of 1,500.

[25]For a grand total of future anticipated healthcare
431

[1]costs of $ 421,012.

[2]Q Doctor, I don't know if you mentioned the total of the

[3]physiatrist or neurologist visits, what was the total of column

[4]one?

[5]A That's right, I didn't say that one, it's not circled

[6]so I know you're right. The total for the neurologist is

[7]$ 61,833.

[8]MR. WITTENSTEIN: Thank you. I have nothing

[9]further, your Honor.

[10]THE COURT: Cross-examination.

[11]MR. KEHOE: Sure. Can I ask the witness go back

[12]on the stand?

[13]THE COURT: Sure.

[14](Whereupon, the witness resumed the witness

[15]stand.)

[16]CROSS EXAMINATION

[17]BY MR. KEHOE:

[18]Q I am **[*73]** the attorney who represents the defendants who are

[19]being sued in this lawsuit.

[20]We never met before, correct?

[21]A Correct.

[22]Q You work at Stony Brook in the office of Public Health

[23]Management?

[24]A No, it's the Department of Health Care Policy and

[25]Management.

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[1]Q What's the general nature of that practice, of that

[2]field?

[3]A The field?

[4]Q Yes.

[5]A The field is about healthcare administration and

[6]management, so we train future leaders in the healthcare

[7]profession. They go on to be CEO's of hospitals or finance

[8]directors, continuous quality improvement. But we also train in

[9]policy where they go on to work for the government I teach a lot

[10]about how we translate what's going on with policy to

[11]management.

[12]Q So you're very familiar with the big healthcare debate

[13]in the country?

[14]A Absolutely.

[15]Q The present law in effect now?

[16]A Yes.

[17]Q Am I correct that under the present law a person with a

[18]preexisting condition can get -- that's no longer a bar to

[19]getting a policy of insurance?

[20]MR. WITTENSTEIN: Objection.

[21] **[*74]** THE COURT: Sustained.

[22]Q Are you familiar -- are you familiar with a party's

[23]ability, as to how the law is now in effect to purchase

[24]insurance, and how if at all it would be affected by preexisting

[25]conditions?

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[1]MR. WITTENSTEIN: Objection.

[2]THE COURT: Sustained. Outside the scope of

[3]direct.

[4]Q Do you have any expectation that the numbers that you

[5]gave the jury are the actual expenses that the plaintiff himself

[6]will incur?

[7]MR. WITTENSTEIN: Objection to her expectations.

[8]THE COURT: Sustained.

[9]Q Your testimony, just so I understand it, you just

[10]followed what was written in a report by Dr. Richter and you put

[11]some percentages on that, correct?

[12]A Correct, based on national statistics.

[13]Q You based it on the 25 years past rate of inflation for

[14]each of those services, then you just took that and put it 25

[15]years in the future, or whatever years in the future you did,

[16]correct?

[17]A Yes.

[18]Q You have no -- so really you just put in the numbers as

[19]far as the math?

[20]A That's right.

[21]Q You're not here to offer any experience, any real

[22] **[*75]** expertise in healthcare management or healthcare policy?

[23]MR. WITTENSTEIN: Objection, beyond the scope.

[24]THE COURT: Overruled.

[25]A The numbers that I provided in my report are within a
434

[1]reasonable degree of economic certainty, so we have no certainty

[2]about what's going to happen in the future, and we have no

[3]reason to believe that things are going to be dramatically

[4]different over the next 25 years particularly since this month

[5]the Supreme Court is going to be deciding on what happens with

[6]healthcare reform. What I presented is what I believed to be

[7]reasonably true.

[8]Q But you're basing that not on a person's course to buy

[9]a policy of insurance --

[10]MR. WITTENSTEIN: Objection.

[11]Q You based it on what --

[12]MR. WITTENSTEIN: Objection.

[13]MR. KEHOE: She answered it's a Supreme Court

[14]ruling.

[15]THE COURT: Sustained.

[16]Q Let me ask you this, are you aware that earlier this

[17]morning before you testified that Dr. Richter told the jury he

[18]has no idea of when the plaintiff will really begin to need this

[19]treatment?

[20]MR. WITTENSTEIN: Objection, mischaracterization. **[*76]**

[21]THE COURT: Sustained as to form.

[22]Q Do you know what Dr. Richter testified this morning

[23]concerning when the plaintiff will actually, in his opinion,

[24]will begin to need any future medical attention?

[25]A No, I do not.

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[1]Q So if he didn't begin for ten years what would be the

[2]difference of the price?

[3]A I could calculate the numbers if it -- you're saying if

[4]the treatment doesn't begin --

[5]Q Dr. Richter could not give an opinion when the

[6]plaintiff was going to start any of this treatment --

[7]MR. WITTENSTEIN: Objection, improper

[8]hypothetical.

[9]Q -- if he never has any future treatment --

[10]THE COURT: Excuse me, excuse me, you want me to

[11]rule on the objection?

[12]MR. KEHOE: Objection.

[13]THE COURT: Sustained.

[14]MR. KEHOE: Then I don't want you to rule on it.

[15]Q Let me ask you if agree with me, if the plaintiff

[16]doesn't have any future medical treatment his cost is zero,

[17]correct?

[18]MR. WITTENSTEIN: Objection.

[19]THE COURT: Overruled.

[20]A Yes, if he has no treatment it would be zero. But I

[21]was basing it on the medical expertise **[*77]** of Dr. Richter.

[22]Q That's all you're basing it on, correct?

[23]A Absolutely.

[24]Q How about in your healthcare -- I keep misquoting what

[25]your expertise is -- as a chair of the Department of Healthcare

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[1]Policy And Management most of your work has to do with policy

[2]and healthcare management, and does that deal with patients

[3]working with their own -- the actual teaching of physicians?

[4]A What I do is I teach about health management and health

[5]policy. What my expertise is in is more policy.

[6]Q Is what?

[7]A Policy.

[8]Q Politics?

[9]A Policy, not politics.

[10]Q Generally when you teach you have an expectation that

[11]the subjects you're teaching about deal with actual patients

[12]going to their actual treating healthcare providers?

[13]MR. WITTENSTEIN: Objection, improper.

[14]Q Correct?

[15]THE COURT: Sustained.

[16]Q Would your opinion -- so your opinion is totally based,

[17]all those facts, all those numbers, is totally 100 percent based

[18]on Dr. Richter's report that you received, correct?

[19]A Correct.

[20]Q It doesn't take into consideration the opinions **[*78]** of the

[21]plaintiff's treating physicians?

[22]A I am not aware of who that is, so no.

[23]Q You are aware that Dr. Richter is not a treating

[24]physician of the plaintiff, are you aware of that?

[25]A No.

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[1]Q You think he is a treating physician?

[2]A I don't know.

[3]MR. WITTENSTEIN: Objection.

[4]THE COURT: Sustained.

[5]Q You read his report?

[6]A I read his report.

[7]Q Does his report say he is the treating physician?

[8]A No.

[9]MR. WITTENSTEIN: Objection.

[10]THE COURT: Sustained.

[11]Q I will ask it again then. After you read his report do

[12]you now have an opinion whether he is or is not a treating

[13]physician of the plaintiff?

[14]MR. WITTENSTEIN: Objection.

[15]THE COURT: Sustained.

[16]Q Can you tell us based on your formulas the reasonable

[17]cost if the plaintiff did not begin any treatment for 20 years?

[18]MR. WITTENSTEIN: Objection, based on reasonable

[19]cost.

[20]Q What's your opinion to the plaintiff's cost --

[21]THE COURT: Excuse me, overruled.

[22]A So the question is --

[23]Q In other words, if he didn't begin any treatment **[*79]** for 20

[24]years, what's his expenses?

[25]A So if he didn't begin treatment for 20 years it would
438

[1]be roughly in half of what I had done.

[2]Q That's just a ballpark figure?

[3]A Ballpark figure.

[4]Q We got the to point if he did it for about five years

[5]and stopped what would that mean?

[6]A You want me to give you a ballpark figure overall?

[7]Q Yes.

[8]A Probably about 25,000.

[9]Q If the only treatment that he went to was the visits to

[10]the neuropsychologist for the next year and-a-half how much

[11]would his reasonable cost of expenses be?

[12]A 5,700.

[13]Q That's 5,700?

[14]A Yes.

[15]Q That amount, that 5,700 is taking into account

[16]inflation?

[17]A No.

[18]Q You're not assuming there's going to be inflation

[19]because it will be something that's completed in a relatively

[20]short time, correct?

[21]A Yes, correct.

[22]Q So just to sum up, you based this on a hundred percent

[23]on what Dr. Richter's report stated and you did the math?

[24]A Yes.

[25]Q It had nothing to do with policy?

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[1]A Right.

[2]Q Nothing to do with healthcare **[*80]** management?

[3]A It does in that I did the research on what the last 25

[4]years showed and what we can say -- what the experts from

[5]Federal statistics would say about what's to come in the next 20

[6]years.

[7]Q Is that based on healthcare costs in the United States

[8]or Mexico?

[9]A United States.

[10]Q Did you do -- were you asked to do any opinion as to

[11]what the costs would be in Mexico?

[12]MR. WITTENSTEIN: Objection.

[13]THE COURT: Sustained.

[14]Q Do you know the difference between -- of the amounts of

[15]the healthcare costs in the United States or Mexico?

[16]MR. WITTENSTEIN: Objection.

[17]THE COURT: Sustained.

[18]Q That's based on your opinion if the plaintiff lives and

[19]does all the treatments that's mentioned in Dr. Richter's

[20]reports and remains in the United States and lives for that

[21]period of time, correct?

[22]A Correct.

[23]MR. KEHOE: Thank you very much.

[24]MR. WITTENSTEIN: Very briefly, Judge.

[25]THE COURT: Redirect.

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[1]REDIRECT EXAMINATION

[2]BY MR. WITTENSTEIN:

[3]Q Doctor, would it be fair to say that you were engaged

[4]solely for the purpose **[*81]** of performing economic analysis of Mr.

[5]Reyes's future healthcare costs within a reasonable degree of

[6]economic certainty?

[7]A Yes.

[8]Q God willing Mr. Reyes lives 20 years longer than what's

[9]in the chart, would the future medical care be more than a half

[10]a million dollars higher than what's currently shown on that

[11]chart?

[12]A If he lived 20 more years, yes.

[13]MR. WITTENSTEIN: Thank you. Nothing further.

[14]THE COURT: Recross?

[15]MR. KEHOE: I have nothing further, your Honor.

[16]Thank you.

[17]THE COURT: Thank you doctor, you may step down.

[18]THE WITNESS: Thank you.

[19]THE COURT: Counsel approach, please.

[20](Whereupon, discussion held off the record.)

[21]THE COURT: Members of the jury, we're going to

[22]recess until Monday. As I told you tomorrow -- we will not

[23]have any sessions tomorrow, you will be able to return to

[24]your normal every day lives and will not have any jury

[25]service for Friday. We will resume the trial on Monday.
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[1]We'll have a later start, at ten o'clock, not 9:30, ten

[2]o'clock. So I will say to you now, have a good weekend,

[3]see you on Monday at ten **[*82]** o'clock.

[4](Whereupon, the jury left the courtroom.)

[5](Whereupon, the trial was adjourned to Monday, May

[6]11, 2012 at 10 o'clock a.m.)

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